BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEWAYNE DWIGHT JONES Claimant VS. **STAFFMARK** Respondent AND **ACE AMERICAN INSURANCE CO.** Insurance Carrier	)	Docket No. 1,064,159

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 25, 2013, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Michael Downing of Kansas City, Missouri, appeared for claimant. Edward Heath, Jr. of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to prove his alleged injury arose out of and in the course of employment with respondent or that the alleged injury requires additional medical treatment. Therefore, the ALJ denied claimant's request for medical benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 24, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the evidence as a whole supports a finding that he sustained an accidental injury arising out of and in the course of his employment with respondent and is entitled to medical benefits.

Respondent contends the ALJ correctly found claimant did not credibly prove his alleged injury arose out of and in the course of his employment, and therefore, the ALJ's decision should be affirmed.

The issue for the Board's review is: Did claimant's injury by accident or repetitive trauma arise out of and in the course of his employment with respondent, entitling claimant to medical benefits?

FINDINGS OF FACT

Respondent is a temporary employment service. In October 2012[1], claimant was assigned by respondent to work for Toys R Us, picking and loading boxes onto trucks. The position required claimant to repetitively lift large boxes and load them onto a metal frame, which was then moved by machinery and loaded onto a truck.

Claimant testified he began to experience pain in his left shoulder approximately mid-December 2012. He believed he had pulled a muscle in his left shoulder but did not report an injury at that time, since he "didn't take [*sic*] too much of it but just to work it out."[2]

Claimant eventually reported his recurring pain to his immediate supervisor at Toys R Us. He did not report his injury to respondent. When asked by his Toys R Us supervisor if he was seeking medical treatment at that time, claimant stated he was not, as the pain was not severe. Claimant continued to work at Toys R Us for respondent until December 27, 2012.

On Friday, December 28, 2012, claimant helped his cousin move a 50 pound headboard box. He contends the move contributed to his symptoms, but was not the cause of his injury. On December 30, 2012, claimant went to the emergency room at Research Medical Center with left shoulder pain. Claimant testified he informed emergency room personnel he was unable to sleep or lie on his shoulder because of the pain. Records indicate claimant had suffered pain for seven days, but there was "no injury."[3] An x-ray taken of claimant's left shoulder returned normal results. Claimant was diagnosed with a shoulder strain and provided with an injection and pain medication. He was taken off work for one week.

On January 2, 2013, claimant contacted respondent and advised his supervisor he was unable to report to work due to his ongoing pain. Claimant informed respondent he

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[1] Claimant testified he began his Toys R Us assignment in September 2012; however, respondent did not receive the Toys R Us account until October 2012.

[2] P.H. Trans. at 7.

[3] P.H. Trans., Cl. Ex. 1 at 10.

had an injury to his left shoulder, but did not at that time attribute the injury to his employment. Rather, claimant told his supervisor he believed the process of moving his cousin helped progress his shoulder pain.

Claimant again contacted his supervisor on January 7, 2013, regarding his left shoulder and this time informed her that his shoulder injury was related to his employment with respondent and his work at Toys R Us. Respondent then referred claimant to Occupational Health Services (OHS).

Claimant was examined at OHS on January 10, 2013. He reported to OHS he had worked a shift from 4:00 p.m. to 2:30 a.m. on December 28, 2013. Additionally, claimant indicated he believed the extended shift had caused an injury to his left shoulder. OHS records further note claimant did not feel a specific incident had caused the problem with his shoulder, but that he awoke the following day and "couldn't move" his arm.[4] Claimant was diagnosed with left shoulder strain with possible rotator cuff pathology. OHS prescribed ibuprofen and released claimant to return to work full duty. Claimant testified OHS recommended an MRI, which was never authorized. Claimant remains off work.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

[4] P.H. Trans., Cl. Ex. 2 at 1.

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
> . . . .
>
> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

This Board member agrees with the ALJ that claimant has failed to meet the burden of proving that he suffered an injury by repetitive trauma arising out of and in the course of employment with respondent. K.S.A. 2012 Supp. 44-508(e) places the burden on the claimant to prove by a preponderance of the evidence that claimant's work activities were the the prevailing factor in causing the injury, and the repetitive nature of the injury must be demonstrated by diagnostic or clinical tests.

The record contains no medical evidence the claimant's work activities were the prevailing factor in causing of his shoulder injury. Additionally, the medical records do not support the conclusion that claimant suffered a series of repetitive traumas leading to his shoulder condition. The emergency room records note a history of pain on the left side of the neck, left shoulder and left arm for a week prior to December 30, 2012.[7] The history also notes that claimant did not suffer an injury. The OHS notes indicate that claimant injured himself on December 28, 2012, a date on which he was not working. Claimant's

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

[7] P.H. Trans., Cl. Ex. 1 at 10.

last day worked was December 27, 2012. Claimant testified that he helped his cousin move on the Friday before he went to the emergency room. The Friday before the emergency room visit was December 28, 2012. The need for medical treatment that compelled claimant to visit the emergency room did not arise until after he helped his cousin move.

CONCLUSION

Based upon the foregoing, this Board member finds that claimant has failed to sustain the burden of proving that his work activities were the prevailing factor causing his injury and need for medical treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 25, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge